

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-212304; B-212304.3

June 18, 1984

MATTER OF: E.S. Edwards & Son, Inc.; Koch Corporation

DIGEST:

1. Solicitation requirement that bidder certify--in its bid--that product offered has been in satisfactory and efficient operation at listed installations is directed to performance history of product and thus involves bid responsiveness, even though included in a clause that also requires information pertaining to the bidder's responsibility. Since responsiveness must be determined at opening, a bid which did not include the certification must be rejected as nonresponsive, even if required information is submitted after opening.
2. Protest alleging that amendment to invitation for bids unduly restricted competition is untimely when filed after bid opening, since GAO Bid Protest Procedures require protests based upon alleged solicitation defects which were apparent before bid opening to be filed by that time.
3. Agency's failure to follow regulations concerning award notwithstanding a bid protest, failure to notify protester of award, and delay in submitting a complete administrative report are all procedural deficiencies that do not invalidate an otherwise proper award.

E.S. Edwards & Son, Inc. and Koch Corporation protest the rejection of their bids as nonresponsive and the subsequent award of a contract for window replacement at the

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Veterans Administration Medical Center, Indianapolis, Indiana, to Hugh J. Baker & Co. We deny the protest in part and dismiss the remainder.

By amendment to invitation for bids No. 583-28-83, the VA advised bidders that the Contracting Officer's approval was required for products or services of the proposed manufacturer, as well as for suppliers and installers. The amendment required bidders to submit--with their bids--certification that:

"(a) Manufacturer regularly and presently manufactures the specified windows as one of its principal products.

(b) Installer has technical qualifications, experience, trained personnel and facilities to install specified items . . .

(c) Manufacturer's product submitted has been in satisfactory and efficient operation. Submit list of installations."

Although both Edwards and Koch submitted lower bids than Baker, neither identified the windows being offered nor provided the required certification. After opening, in response to a request from the VA, Edwards identified two windows available to the VA under its offer; however the contracting officer found that one did not meet the technical specifications and that the other was not regularly and presently manufactured. As for the windows that Koch identified after bid opening, the contracting officer ultimately found that one model met the specifications, but refused to accept Koch's certification because it had been submitted after bid opening. Edwards initially filed a protest with the agency and, after the award to Baker, both Edwards and Koch protested to our Office.

The protesters claim that the windows they are offering conform to the specifications. In addition, Koch argues that the VA waived any requirement for data to be submitted with bids when it failed to declare them non-responsive immediately and instead requested additional information from the low bidders. Edwards also argues that the VA cannot rely upon the requirements imposed by the amendment to find its bid nonresponsive.

Since neither firm included with its bid the required certification that the windows were in satisfactory and efficient operation at listed installations, we need not consider whether the windows actually conformed to specifications. Rather, as discussed below, we believe both bids were nonresponsive and were properly rejected by the VA whatever their characteristics as established by information submitted after bid opening and whatever the reason advanced by the VA as justification for rejection. See Computer Terminal Sales, B-200366, Jan. 22, 1981, 81-1 CPD ¶ 37 (bidder not prejudiced by rejection of its bid for possibly incorrect reasons where bid was otherwise non-responsive).

In general, a bid is responsive only when the bidder unequivocally offers to provide supplies or services that conform to all material terms and conditions of the invitation. The determination as to whether a bid is responsive is to be distinguished from the determination as to whether a bidder has the apparent ability and capacity to perform the contract requirements, i.e., from the responsibility of the bidder. While responsiveness must be determined on the basis of a bid as submitted, requirements bearing on responsibility may be met after opening. See E. H. Hughes Company, Inc., 61 Comp. Gen. 581 (1982), 82-2 CPD ¶ 189; Raymond Engineering, Inc., B-211046, July 12, 1983, 83-2 CPD ¶ 83.

Some of the requirements imposed by the amendment in this case appear directed more toward the responsibility of the bidder (or its subcontractors or suppliers) than the responsiveness of the bid. The subsection (a) requirement that the manufacturer of the windows "regularly and presently manufactures" them suggests a concern with the ability of the manufacturer to produce the items and thus

concerns responsibility rather than responsiveness. See Jensen Corp., 60 Comp. Gen. 543 (1981), 81-1 CPD ¶ 524; B-175493(1), April 20, 1972. Similarly, subsection (b) seeks to ensure that the installer of the windows has a satisfactory experience record, and thus involves responsibility. See Gaffny Plumbing and Heating Corp., B-206006, June 2, 1982, 82-1 CPD ¶ 521.

On the other hand, we have recognized that experience clauses may include elements that relate to responsiveness as well as responsibility, see Jensen Corp., supra, 60 Comp. Gen. at 546, 81-1 CPD ¶ 524 at 5-6; B-175493(1), supra, at 4, and we have specifically held that information bearing on the performance history of a product involves responsiveness. See, e.g., Sunsav, Inc., B-205004.2, Nov. 29, 1982, 82-2 CPD ¶ 476 (holding that failure to submit with a bid the required information indicating that 1,000 units of the product offered were in successful operation in commercial installations required rejection of bid as nonresponsive).

Here, since information as to whether a product to be supplied has been in satisfactory and efficient operation relates primarily to the performance history of the product and only secondarily to the capability and experience of a bidder, who may not be the manufacturer of the product, we believe that the requirement in subsection (c) that bidders certify that the windows being offered had been in satisfactory and efficient use concerns the responsiveness of a bid. Our conclusion in this regard is reinforced by the further requirement for submission of a list of installations at which the product was in satisfactory and efficient use. See E.C. Campbell, Inc., B-203581, Oct. 9, 1981, 81-2 CPD ¶ 295; but cf. Commercial Window & Door Co., Inc., B-211280, Nov. 18, 1983, 83-2 CPD ¶ 582 (solicitation requiring test data to be submitted with bid to show that product conforms to specifications should warn that failure to furnish with bid will render bid nonresponsive).

In our opinion, the VA's amendment was inartfully drafted. It would have been preferable to separate the information bearing on responsibility from that required to determine whether the windows offered had a history of

satisfactory use, since the latter affected the responsiveness of bids. A specific requirement for identifying the manufacturer and model number--information the VA requested later--also should have been included. Nevertheless, since the requirement for certification accompanying the bids was clearly stated, we find the VA's rejection of Edwards and Koch for failure to provide it proper.

As for the alleged waiver of the requirement in subsection (c), there is no indication that the VA formally waived it under the Federal Procurement Regulations (FPR), 41 C.F.R. § 1-2.405 (1983), which allows waiver of informalities or irregularities that have a trivial or negligible effect on price, quantity, quality or delivery. Nor do we believe that the VA informally waived the requirement by actions that induced detrimental reliance by Edwards and Koch, so that the agency is estopped from insisting upon the certification. See Pepsi Cola Bottling Company of Salina, B-203680.3, April 22, 1983; B-174410, June 30, 1972. The VA's post-bid opening requests for information could not have induced bidders initially to submit non-responsive bids.

In summary, we believe that the requirement that bidders certify at bid opening that the windows offered were in satisfactory and efficient use was material, since it directly concerned the quality of the windows offered, and any waiver of the requirement and subsequent award to Edwards and Koch would have been improper. See Coast Iron & Machine Works, Inc., 57 Comp. Gen. 478 (1978), 78-1 CPD ¶ 394; Northern Telecom, Inc., B-209412, April 12, 1983, 83-1 CPD ¶ 382; cf. John C. Dorsey, Inc., B-212789, Sept. 20, 1983, 83-2 CPD ¶ 350 (improper to consider required descriptive literature submitted after bid opening even if agency had advised bidder that this would be acceptable, because to do so would confer unfair competitive advantage on bidder).

The remaining issues are either untimely or do not affect the validity of the award. Koch contends that amendment No. 2 was unduly restrictive because, by forcing bidders to decide upon products and suppliers before submitting their bids, it burdened bidders and exceeded the government's minimum needs. Our Bid Protest Procedures

require protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening to be filed before bid opening. 4 C.F.R. § 21.2(b)(1) (1984). Since the requirements to which Koch objects were apparent before bid opening, but Koch did not protest until after that time, we will not consider its protest on this basis. See Lazos Construction Co., Inc., B-211966, Aug. 11, 1983, 83-2 CPD ¶ 201.

Edwards further alleges that the VA improperly made award to Baker before the final resolution of the protest. However, an agency's failure to follow regulations in making an award notwithstanding the pendency of a protest is merely a procedural defect, and does not affect the validity of an otherwise proper award. See Creative Electric Inc., B-206684, July 15, 1983, 83-2 CPD ¶ 95. As for Koch's allegation that the VA failed to notify it promptly of award, see FPR, 41 C.F.R. § 1-2.408-1(a)(1), we have held that such a failure is also merely a procedural defect not affecting the validity of an award. See Kan-Du Tool & Instrument Corp., B-210819, June 21, 1983, 83-2 CPD ¶ 12.

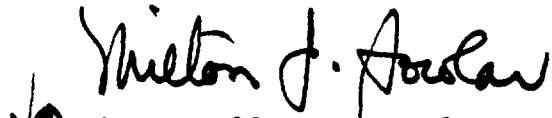
We note that we did not receive the VA's report on these protests until more than 3 months after we requested it, and even then we found it necessary to request additional information. Koch claims that this delay was unjustified and finds it to be evidence that the VA has acted in an arbitrary and capricious manner. We request agencies to submit complete reports to our Office as expeditiously as possible--generally within 25 working days. See 4 C.F.R. § 21.3(c); see also FPR, 41 C.F.R. 1-2.407-8(a)(4). Failure to do so, however, again has no bearing on the validity of an otherwise proper award. See Creative Electric Inc., B-206684, supra, 83-2 CPD ¶ 95 at 4.

Finally, Koch requests reimbursement for the cost of preparing its bid, the loss of anticipated profits, and the cost of pursuing its protest. However, bid preparation costs can only be recovered if the government acted arbitrarily and capriciously, MIMCO, Inc., B-210647.2, Dec. 27, 1983, 84-1 CPD ¶ 22, and if the protester otherwise would have had a substantial chance for award. Koch has not shown that the VA acted arbitrarily or capriciously in rejecting its bid. In any case, there is no legal basis for allowing a protester to recover anticipated profits or

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the cost of pursuing its protest. MIMCO, Inc., B-210647.2, supra, 84-1 CPD ¶ 22 at 3; DaNeal Construction, Inc., B-208469.3, Dec. 14, 1983, 83-2 CPD ¶ 682.

The protests are denied in part and dismissed in part.


for Comptroller General
of the United States